

G. Joint Marketing Rules Adopted By The Commission Must Not Allow BOCs to Promote Electronic Publishing In Violation Of The Statute. (§ III.C)

The Commission must maintain and enforce strictly section 274's joint marketing restrictions. Absent stringent limitations, BOCs will be able to leverage local exchange monopoly power into the provision of electronic publishing through a number of mechanisms, not the least of which is mass marketing. BOC monopoly leveraging would clearly undermine the intent of Congress to preserve electronic publishing as a competitive arena.⁴⁰ The proper interpretation of Congress' joint marketing restrictions in section 274 will maintain the force of the separation requirements. The improper interpretation of Congress' joint marketing restrictions in section 274 will allow the BOC and its in-region electronic publishing joint venture to operate as virtually the same company and will fail to implement Congress' express prohibition on such a close affiliation.⁴¹

Section 274(c)(1)(A) prohibits a BOC from "carrying out any promotion, marketing, sales, or advertising for or in conjunction with" a separated affiliate. Similarly, section 274(c)(1)(B) prohibits a BOC from "carrying out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate

⁴⁰ See Explanatory Statement, Preamble; see also, 47 U.S.C. § 254(k) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition").

⁴¹ See 47 U.S.C. § 274(b) ("A separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company").

that is related to the provision of electronic publishing." The statute unambiguously prohibits joint marketing between a BOC and an in-region electronic publishing separated affiliate or any in-region joint marketing with an affiliate related to the provision of electronic publishing.

Subsections 274(c)(2)(A) and (B) provide the only exceptions to this absolute bar. Section 274(c)(2)(A) permits a BOC to provide inbound telemarketing or referral services for its electronic publishing separated affiliate or joint venture insofar as the inbound telemarketing or referral services are also made available to all electronic publishers on a nondiscriminatory basis. Section 274(c)(2)(B) simply permits a BOC to engage in a non-BOC owned "teaming" or business arrangement to provide its electronic publishing affiliate the necessary facilities and telephone service for electronic publishing, provided that such facilities and services are offered on a nondiscriminatory basis pursuant to tariffed rates and conditions. Aside from these two exceptions, the BOC is flatly prohibited from engaging in joint marketing with its in-region electronic publishing separated affiliate.

The 1996 Act contains slightly different requirements for the joint marketing activities of a BOC and its in-region electronic publishing joint venture. Section 274(c)(1)(A) prohibits a BOC from "carrying out any promotion, marketing, sales, or advertising for or in conjunction with" a separated affiliate. Similarly, section 274(c)(1)(B) prohibits a BOC from "carrying out any promotion, marketing, sales, or advertising for

or in conjunction with an affiliate that is related to the provision of electronic publishing." Section 274(c)(2)(C) permits a BOC participating in an electronic publishing joint venture to "provide promotion, marketing, sales, or advertising personnel and services to" the joint venture,"⁴² although, as the Commission notes, other provisions of section 274 significantly limit this ability.⁴³ The "in conjunction with" language that appears in subsection (c)(1)(A) and (c)(1)(B) is absent from subsection (c)(2)(C). The omission is both deliberate and significant.

Joint marketing of local exchange services with in-region electronic publishing services is the activity to which "in conjunction with" refers. The statutory language refers to the stand-alone activities of two entities (e.g., the marketing of local telephone service and the marketing of in-region electronic publishing services) combined in an effort to benefit simultaneously both entities. Section 274(c)(2)(C) prohibits this combination by omitting the "in conjunction with" language from its list of permissible marketing activities.

The Commission's tentative conclusion in paragraph 53 of the Notice must also apply to the BOC's electronic publishing joint venture: both BOC in-region electronic publishing joint ventures and BOC in-region electronic publishing separated affiliates are prohibited from jointly marketing their electronic publishing

⁴² 47 U.S.C. § 274(c)(2)(C).

⁴³ See Notice at ¶ 52.

services with the BOC's local exchange services. Similarly, the BOC itself may not jointly market its local exchange services with the in-region electronic publishing services of its separated affiliate or joint venture.

A contrary interpretation of the statutory language would render meaningless nearly all of the section 274(b) requirements. If a joint venture were permitted to market jointly the BOC's local exchange services with the joint venture's in-region electronic publishing services, the ability to leverage the BOC's local exchange monopoly into the electronic publishing market would remain. The BOC would be able to provide its in-region electronic publishing separated affiliate or joint venture with the use of its substantial consumer information and contacts developed as a result of its position as a monopoly provider of local exchange services. This alone would constitute a severe competitive disadvantage to other electronic publishing service providers.

Moreover, joint marketing of a BOC's local exchange services with in-region electronic publishing services would create the incentive and ability to provide captive local exchange ratepayers bundled discounts for local telephone and electronic publishing services. The Commission tentatively concludes that bundling discounts for electronic publishing and local exchange services is impermissible.⁴⁴ A blanket prohibition on joint marketing of a BOC's local exchange services with its joint

⁴⁴ See id.

venture's in-region electronic publishing services is necessary to avoid the BOC's incentives and ability to provide bundling discounts through clever marketing schemes.

Finally, joint marketing of a BOC's local exchange services with the in-region electronic publishing services of its separated affiliate or joint venture would violate the independent operation requirement applicable to all rules implemented under section 274. The effective abolition of separation requirements through lax joint marketing rules would violate the 1996 Act's express provisions.

Moreover, it is self-evident that any electronic publishing joint marketing restrictions placed on a BOC must also be applied to the affiliates of the BOC to avoid circumvention of the separation requirements. For example, where a BOC is prohibited from joint marketing with its in-region electronic publishing separated affiliate, then the BOC's video operations, to the extent that they are not separated from the BOC's local exchange services operations, must adhere to the same joint marketing prohibitions. Otherwise, despite the BOC's video operation's ties to the local exchange monopoly (and its identical incentives and abilities to leverage the LEC monopoly), the BOC's video operations could accomplish precisely those goals that the BOC's local exchange operations are prohibited from accomplishing.

The literal terms of section 274(a) compel this result. The requirement of the subsection applies to a "Bell operating

company or its affiliate." ⁴⁵ The term "affiliate" excludes the term "separated affiliate" but otherwise includes "any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company."⁴⁶ Additionally, "Bell operating company" is a specially defined term for purposes of section 274, defined in subsection 274(i)(10) to include both the definition contained in section 3 of the Act, as well as "any entity or corporation that is owned or controlled by such a company." The import of these provisions requires maximum separation between the in-region provision of electronic publishing by the separated affiliate (or joint venture), on the one hand, and any other service or activity by the BOC or any BOC affiliate, on the other hand. By its terms, section 274 explicitly constructs a firewall around the separated affiliate or joint venture and all other BOC enterprises.

IV. BOCS SHOULD NOT BE PERMITTED TO CIRCUMVENT THE REQUIREMENTS OF SECTION 274 THROUGH USE OF A VIDEO DISTRIBUTION AFFILIATE. (§ III.B, C, D)

In an effort to promote competition in the provision of electronic publishing in the face of the monopoly power of the BOCs, section 274 specifies certain activities which must be

⁴⁵ Compare section 274(a) with section 272. Under section 272, the literal terms of the section appear to apply to BOCs and BOC affiliates that are subject to section 251(c) obligations. Time Warner has nonetheless advocated that the FCC must act to close up certain loopholes that could be left open under 272 absent specific administrative action. See Time Warner Non-Accounting Safeguards Comments at 31. Under section 274, Congress explicitly compelled this result.

⁴⁶ 47 U.S.C. § 274(i)(1).

separated from the BOC in the provision of electronic publishing services and requires that a BOC's in-region separated affiliate or joint venture operate independently from the BOC.⁴⁷ In addition, section 254(k) states that a carrier "may not use services that are not competitive to subsidize services that are subject to competition."⁴⁸ The 1996 Act's provisions allow no room for misinterpretation of Congress' intent: BOC local exchange monopoly power must not be permitted to expand into other markets. Thus, in implementing section 274, the Commission must be vigorous in preventing BOCs from leveraging their local exchange monopoly power into the in-region electronic publishing market through other BOC affiliates.

As both a matter of law and policy, effective prevention of BOC monopoly leveraging requires the Commission to look beyond the BOC's local exchange carrier and take into consideration the actions of its affiliates. The Commission must make clear that the BOC cannot do indirectly, through its unseparated affiliates, what it cannot do directly.⁴⁹

As Time Warner indicated in its section 272 Non-Accounting Safeguards Comments, the ability of a BOC to provide video services through an entity not separated from the local exchange

⁴⁷ See 47 U.S.C. § 274(b).

⁴⁸ Id. at § 254(k).

⁴⁹ As described above in Section III.G., the terms of section 274(a) require this construction. The Commission in any event has the authority to reach a Bell holding company in order to address regulatory matters with respect to that holding company's common carrier subsidiaries. See North American Telecommunications Assn. v. FCC, 772 F.2d 1282, 1292-93 (7th Cir. 1985).

operations creates a window through which the BOC may leverage its monopoly power into competitive markets.⁵⁰ If BOCs were able to commingle video offerings and basic telephone service while simultaneously commingling video offerings and electronic publishing services, the separation requirements of section 274 will be completely negated.

To prevent an evisceration of the 1996 Act's competitive safeguards, the Commission must require the BOC to choose to provide its video services with its local telephone services or with its electronic publishing services, but not both. If a BOC desires to integrate some part of its electronic publishing activities with its video operations, it is required by the statute to do so through its electronic publishing separated affiliate or joint venture. If a BOC desires to provide telephone and video services together, then both its telephone and its video services must be separated from the section 274 separated affiliate or joint venture. These safeguards must apply equally to separated affiliates and joint ventures if they are to implement effectively the clear intent of Congress.

In sum, the Commission must not allow BOCs to circumvent section 274's structural separation requirements by providing video services through an unseparated video affiliate together with electronic publishing services. The BOC may choose to provide its video services with its telephone services or with its electronic publishing services, but not both.

⁵⁰ See Time Warner Non-Accounting Safeguards Comments at 29.

The commingling issue raises another concern: the evasion of structural safeguards in section 272 or section 274 by the joint provision of electronic publishing and interLATA information services through a single affiliate. In the Notice, the Commission requests comment on whether a BOC may provide electronic publishing through the same separate affiliate that provides interLATA services.⁵¹ If both the in-region electronic publishing and interLATA information service operations are strictly separated from the BOC's local exchange monopoly, Time Warner supports allowing a BOC to offer the former services through a single affiliate provided, however, that such an arrangement cannot be used to circumvent the safeguards of sections 272 and 274.

Specifically, if a BOC chooses to jointly provide interLATA services and in-region electronic publishing services in a single affiliate, that affiliate must be separated from the BOC pursuant to the most stringent provisions of both sections 272 and 274. Where sections 272 and 274 contain parallel provisions, the section containing the more stringent provisions must apply. Where one section contains restrictions that the other does not contain, the additional restriction must apply to a single BOC affiliate that provides both in-region electronic publishing and interLATA services. In short, the Commission must prevent the BOC from gaming the differences between the two provisions to gain opportunities for anticompetitive behavior. The failure to

⁵¹ See Notice at ¶ 48.

implement these safeguards would permit BOC evasion of the statute itself and would render meaningless the 1996 Act's carefully crafted safeguards.

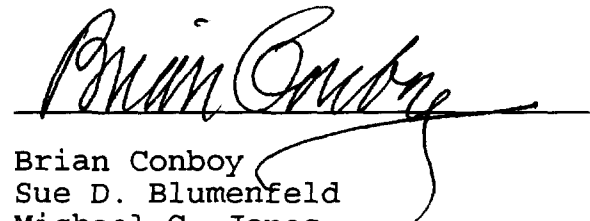
V. CONCLUSION

The Commission should adopt the recommendations contained herein in order to implement the stated intent of Congress to protect the development of competition in the provision of electronic publishing services.

Respectfully submitted,

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4 September 1996

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